Health and Human Services Agency
CalOHII California Office of Health Information Integrity

NEED FOR LEGISLATION ON LAW HARMONIZATION

WHITE PAPER

Privacy Steering Team

Background

In California, the foundation for preserving the confidentiality of individual health information is the Confidentiality of Medical Information Act ("CMIA," at Civil Code section 56 et seq.) and the Insurance Information and Privacy Protection Act (Insurance Code section 791 et seq.). Both laws were enacted in the early 1980's, long prior to the federal Health Insurance Portability and Accountability Act, implemented via 2003 regulations ("HIPAA", at 45 C.F.R. Parts 160 through 164). The CMIA has been revised frequently in piecemeal fashion as legislators added protections to the original framework.

Building haphazardly on this foundation are numerous specific provisions in other California codes, including the Penal Code, Evidence Code, Health & Safety Code, Welfare & Institutions Code, and even the Vehicle Code. Most of the provisions are not well integrated into the two foundational laws, and are far less well-known. In addition, there are other general privacy laws that apply to health information, such as the Information Privacy Act (Civil Code section and1798 et seq.) and the state constitutional right of privacy (Cal. Const. Article 1, section 13). As a result, California's legal protection for the confidentiality of health information is a crazy-quilt of often ill-matched, sometimes inconsistent provisions. Gaps exist, and as the health care industry is changing, the patchwork is fraying.

California healthcare entities must also comply with federal laws protecting health information, including HIPAA. HIPAA is relatively recent and represents a comprehensive effort to enact a national floor of privacy protections for health information in a consistent and comprehensive fashion, applicable to the entire health care industry. While HIPAA is more comprehensive than state law, it is not above criticism. Most notably, HIPAA has no heightened protection for sensitive information, while California law provides special protection for certain types of sensitive information.

Challenges

The two primary state laws on the confidentiality of health information have not been revised to take HIPAA into account, except in a piecemeal fashion which at times has made the matter worse, not better. In their compliance efforts, California health care providers and health plans must consider the potential preemption of state law by HIPAA. Such preemption analyses are done entity by entity in California, though some industry groups and governmental agencies have provided guidance.

Given the lack of consistency within California law, the lack of consistency between California law and HIPAA and the individual nature of preemption analyses, there is no one, comprehensive "rule" for the use and disclosure of health information in California. As the health care industry begins to use electronic exchange of health information to improve efficiencies and ensure quality of care, the lack of consistent understanding of the law by health care entities is a barrier to progress. Law harmonization is now a critical issue. In addition, a revision of existing California laws is necessary because providers and patients want assurances that all parties involved in electronic exchange will treat the confidential information consistently, in accordance with the requirements under the law.

Testing Policies and Practices

CalOHII Demonstration Projects can test some aspects of the law, such as the development of technical and administrative safeguards, but to resolve the underlying inconsistencies and ambiguities in the laws and regulations governing the use and disclosures of health information, CalOHII has very limited authority. The authority to issue regulations permits CalOHII to interpret applicable law and at best, CalOHII can call out the preemption determinations that need to be made and to interpret and clarify ambiguous terms and phrases in the law. CalOHII does not have authority to create new state law or override existing state law for all entities in California.

CalOHII has been facilitating discussions on this matter with a large spectrum of diverse stakeholders over the last four years and has achieved consensus that law harmonization is urgently needed. In addition, there is a consensus that the ideal solution would be a comprehensive revision of California law.

- The Insurance Information and Privacy Protections Act (Insurance Code 791 et seq.) added in 1980 (Ch 1214 section 1) took the regulation of insurance institutions' use of health information out of the CMIA. It has not been revised, except in a few sections, not related to HIPAA.

- The Confidentiality of Medical Information was revised extensively in 1999 (Ch. 526 (SB 19)) after the legislature had commissioned a work force of diverse stakeholders. The CMIA has been revised almost every legislative session, sometimes addressing HIPAA and other times potentially conflicting with HIPAA.

- HIPAA Security and Privacy rules were issued in 2002. The lack of oversight and transparency of business associates and breath of health care operations has been problematic under HIPAA. Under The Health Information Technology for Economic and Clinical Health (HITECH) Act, Centers for Medicare and Medicaid Services/Office of Civil Rights are to look into making revisions to HIPAA on minimum necessary and health care operations, but it is unclear when and how far they will go. It is projected that revisions to HIPAA are to occur during the next five years.

- The silence under the CMIA on the use of business associates, having a different provision for health care operations, and the conflicting interpretations of the CMIA are problematic. Predominately,the stakeholders have advocated for a more comprehensive approach. Although there is consensus on the need for better clarification on what are the appropriate uses and disclosures of Individual health information; at this time, there is only consensus on some parts, but not all.

Proposed Solution

There are various options for resolving the complex problems identified above. The Privacy Steering Team discussed whether continuation of a piecemeal approach would be successful, in the short run. The piecemeal approach was not approved because the Privacy Steering Team thought that it did not solve the existing segmentation in providing clear, consistent guidance concerning the appropriate use and disclosures of medical information. Also, there were concerns about the effort and time a piecemeal approach would take and the possibility of unintended consequences in addressing such a complex task in a piecemeal fashion.

In an expansion of our stakeholder processes, the Privacy Steering Team will develop a proposal for a comprehensive revision of existing law that will identify the consensus points and the controversial issues with proposed alternatives.